

UNITED STATES OF AMERICA,)
)
v.) Criminal No. 02-CR-05-P-C
)
JAMES D. McINNIS,)

Before the Court for action is the Amended Petition for Warrant or Summons for Offender under Supervision (Docket Item No. 39). The Petition sets out five alleged violations by the Defendant of various conditions of his Supervised Release. At a hearing on the Petition on October 13, 2004 the Defendant admitted to Violations 1, 2, 3, and 5 as charged in the Petition. Violations 1, 2, and 5 are Grade C violations and Violation 3 is a Grade B violation. The Defendant disputes only Violation 4, which is either a Grade A or Grade B violation under the Sentencing Guidelines. The Defendant admits to the facts of Violation 4, but contends that his Supervised Release should not be revoked on that basis because he voluntarily gave Deputy U.S. Marshal Galvin information in reliance on a promise by Galvin that he would not prosecute which led to the discovery and seizure from his possession of more than a pound of marijuana, possession of which is the substantive element of the violation.

At the hearing various witnesses testified, both for the Government and the Defendant. The testimony was conflicting on the factual issue of whether Deputy U.S. Marshal Galvin elicited from the Defendant information which lead to the discovery and seizure of the marijuana by making to the Defendant a promise that the Defendant would not be prosecuted if he disclosed the whereabouts of the marijuana. Marshal Galvin

adamantly denied that he had made any such promise. The only contradicting testimony was given by Defendant's girlfriend, Dee Cheat.¹ I disbelieve Ms. Cheat's testimony in respect to the making of such a promise. I deduce from her attitude and demeanor on the witness stand that her testimony on the point is not credible because she is dedicated to helping the Defendant, with whom she has a close personal relationship, avoid a revocation on the basis of his possession of over one pound of marijuana. I find Deputy Marshal Galvin's denial that he made such a promise to be fully credible and consistent with the evidence of the incident that resulted in the discovery of marijuana. No credible reason is established in the evidence as to why Marshal Galvin would make such a promise. As a trained federal law enforcement officer, he would, and did, I find, clearly understand that the making of such a promise would jeopardize the use, after seizure, of the marijuana as evidence and perhaps even vitiate the conduct of the entire enforcement exercise in which he was then engaged.

Further, I **CONCLUDE** that, as a matter of law, Marshal Galvin had no authority, express, actual or implied, to make an enforceable promise of the nature claimed. *United States v. Flemmi*, 225 F.3d 78 (1st. Cir. 2000). The Marshal Service is an investigatory arm of the Department of Justice. It is not a prosecutorial agency such as the United States Attorney's Office. It is without any authority deriving from its investigatory role, even when its activities complement or underlie the activities of the U.S. Probation Office or the United States Attorney's Office, to make promises to suspects that are binding upon the prosecutor or the probation office.

¹ Other friends of the Defendant, who were also present in the apartment when the officers arrived there, testified that another U.S. Marshal made a similar promise to them. I reject those claims for lack of credibility due to the self-interest and bias of these witnesses. I do not believe any U.S. Marshal made any such promise to any of those persons.

“The short of it is that the power to prosecute plainly includes the power not to prosecute...whereas the power to investigate does not necessarily encompass (or even reasonably imply) the power to grant use immunity.”

Id. at 87. This principle, applied to agents of the Federal Bureau of Investigation in *Flemmi*, is equally applicable to the Deputy United States Marshals involved in the circumstances of this case. Further, there is not any evidence whatever that any prosecutor or probation officer gave, by implication or otherwise, Marshal Galvin any basis to believe that he had any authority whatsoever to make any promise of use immunity to the Defendant, or to anyone else. It is clear that any such promise made independently by him or any other Deputy U.S. Marshal would have exceeded the scope of such officer's actual authority and would be unenforceable even if made. *Id.* at 80.

Accordingly, I **FIND** the Defendant was, on the occasion in question, in possession of over one pound of marijuana, and that he did possess it with intent to distribute. I **CONCLUDE** that this conduct was a violation of Special Condition No. 1 of the terms and conditions of his term of Supervised Release as a violation of 17-A M.R.S.A. § 1103(3)(A), a Class C Felony under Maine state law punishable by up to five (5) years of imprisonment as alleged in the Petition herein. The evidence at the hearing establishes by a preponderance of that evidence that the Defendant possessed a distributable amount of marijuana. I **CONCLUDE** that his term of Supervised Release must be, and it is hereby **REVOKED** pursuant to U.S.S.G. § 7(B)(1.3)(a)(1).

It is hereby **FURTHER ORDERED** that the customary Revocation Report be

filed and that the matter be seasonably scheduled for a hearing for the determination and imposition of sentence.

/s/Gene Carter
Gene Carter
Senior U.S. District Court Judge

Dated at Portland, Maine this 19th day of November, 2004.

Defendant

JAMES D MCINNIS (1)
TERMINATED: 05/20/2002

represented by **MARY A. DAVIS**
TISDALE & DAVIS
P.O. BOX 572
PORTLAND, ME 4112
879-9177
Email: td@maine.rr.com
TERMINATED: 05/20/2002
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

ROBERT C. ANDREWS
LAW OFFICE OF ROBERT C.
ANDREWS
P.O. BOX 17621
PORTLAND, ME 04112
879-9850
Fax: 879-1883
Email: rcaesq@maine.rr.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts

21:841A=ND.F NARCOTIC -
SELL, DISTRIBUTE, OR
DISPENSE: Distribution of
cocaine base and abetting such
conduct, in violation of 21 U.S.C.
section 841(a)(1) and 18 U.S.C.

Disposition

Imprisoned for a total term of 12
months; Supervised Release for a
total term of 36 months; Special
Assessment of \$100; Fine is
waived

section 2
(1)

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

--

None

Complaints

None

Disposition

Plaintiff

USA

represented by **HELENE KAZANJIAN**
OFFICE OF THE U.S.
ATTORNEY
DISTRICT OF MAINE
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email:
helene.kazanjian@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

JONATHAN R. CHAPMAN

OFFICE OF THE U.S.
ATTORNEY
DISTRICT OF MAINE
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email: jon.chapman@usdoj.gov
TERMINATED: 09/16/2004
LEAD ATTORNEY
ATTORNEY TO BE NOTICED